THE UNITED STATES OF AMERICA

v.

SHEARN DELAMORE & CO AND DREW & NAPIER; JOSEPH LEE HENN SHEN (THIRD PARTY)

HIGH COURT MALAYA, KUALA LUMPUR
VINCENT NG J
[CIVIL SUIT NO: D1-22-531-1994]
29 SEPTEMBER 2006

CIVIL PROCEDURE: *Third party proceedings - Indemnity - Plaintiff's claim for loss occasioned from defendant solicitor's failure to advise properly - Whether defendant had right to indemnity from third party solicitor - Whether third party was sub-agent, agent or substituted agent of plaintiff*

CIVIL PROCEDURE: *Third party proceedings - Indemnity - Whether third party could rely on statements averred to in pleadings between plaintiff and defendant without further proof or evidence - Rules of the High Court 1980, O. 16 r. 3(3)*

CONTRACT: *Agency - Solicitor - Third party proceedings - Plaintiff's claim for loss occasioned from failure to advise properly - Whether defendant solicitor had right to indemnity from third party solicitor - Whether third party was sub-agent, agent or substituted agent of plaintiff - Contracts Act 1950, s. 145*

LEGAL PROFESSION: *Remuneration - Admiralty suits - Professional bill - Whether bill for contentious or non-contentious work - Whether bill in accordance with Sabah Remuneration Rules 1998*

The plaintiff, the mortgagee of two vessels, engaged the defendant to act for the plaintiff in proceedings for the arrest and foreclose of the said vessels that were laid off at the port of Labuan in East Malaysia. The defendant was only entitled to practice in West Malaysia and therefore appointed the third party as its agent in East Malaysia in respect of the said matter. Pursuant to an order of sale, the vessels were eventually sold through a public auction under the direction of the Sheriff and were successfully bid for by the plaintiff at US$25.1 million. The plaintiff paid the auctioneer's bills and the Sheriff's commission on the auction sale to the defendant who remitted the payment to the third party who in turn disbursed the said payment accordingly. Subsequently, the

A third party issued to the plaintiff his professional bill for US$300,000 but no payment was made on the bill despite reminders and requests made to the defendant. After that the third party sent a revised final bill for the sum of US$531,000 to supersede the earlier bill on the ground that the rate of charges
B applied in the earlier bill was not in accordance to the 13th schedule of the Sabah Remuneration Rules 1988 ('the Rules'). The final bill was also sent to the defendant to be forwarded to the plaintiff. Both plaintiff and defendant denied liability. It followed that the Sheriff forwarded to the third party a refund of
C RM1,350,595.20 being the excess of the Sheriff's commission. The third party notified the defendant of the refund but proceeded to apply the said refund to set off his final bill. Hence, the plaintiff's action against the defendant for failing to advise properly on the commission and for a claim of the said refund.
D The defendant, on the other hand, served a third party notice on the third party. During the course of the proceedings, the plaintiff and the defendant entered a compromise for RM900,000 and subsequently recorded a consent judgment leaving only the defendant's claim against the third party and the counterclaim by
E the third party. The third party submitted that since he became a party to the main action he could rely on any statements averred to in the pleadings between the plaintiff and the defendant without further proof or evidence.

F **Held (allowing defendant's claim against third party):**

(1) The third party was not a party to the action between the plaintiff and the defendant but only a party *vis-à-vis* the defendant and the third party in the light of O. 16 r. 3(3) of
G the Rules of the High Court 1980 ('RHC'). The trite principle that parties to an action are circumscribed by their pleadings governs only the pleadings *vis-à-vis* the plaintiff and the defendant separately from that between the defendant and the third party. It followed that the third party was not entitled
H to use in his favour any admitted facts even if found in the pleadings which were mere averments between the plaintiff and the defendant. He was still obliged to adduce evidence on oath to support his case. (paras 16, 17, 18)

(2) Based on the authorities, the question of whether a party is
I an agent or sub-agent or substituted agent of the principal largely depends on the extent the principal has control or direction over the party. (para 22)

(3) Once the defendant's witness was admitted as an advocate of the High Court of Borneo in respect of the two Admiralty Suits related to the current case, he was deemed to be an authorised solicitor in that High Court for the purposes of those suits. (para 25)

(4) The third party made it clear that he looked to both the defendant and the plaintiff for payment of the final bill. It was also to be noted that the bill preceding the final bill was addressed only to the defendant. The contents of the third party's letter to the defendant should also be referred to. Accordingly, there was nothing to estop or preclude the defendant from maintaining the correct legal position that the third party was its agent and that it ought to have been the defendant to whom the third party was entitled to look for payment. Since the third party was the defendant's agent and not the substituted agent of the plaintiff's, the consequences in s. 145 of the Contracts Act 1950 must follow. (paras 26 & 27)

(5) An adverse inference should not be drawn against the defendant by the third party for not calling the plaintiff to give evidence in the third party proceedings. That was clearly without basis or merit especially in the light of the third party's stance in electing not to cross-examine the defendant's witness and in not leading any evidence of his own. (para 29)

(6) The undisputed facts of the case showed conclusively the relationship between the relevant parties. As far as the plaintiff was concerned it appointed the defendant to be its agent and the defendant appointed the third party as the defendant's local agent in Sabah for the purposes of the admiralty suits. There was no evidence to suggest that the plaintiff agreed to the third party being appointed as the substituted agent in place of the defendant for purposes of the said suits. (para 30)

(7) Although the third party was the solicitor on record for the plaintiff in the admiralty suits, the defendant had done all the work concerned. The third party's role was merely mechanical, clerical or ministerial in nature such as communicating with the court with regard to the obtaining of early hearing dates and like functions. Therefore, there was no privity of contract between the plaintiff as principal and the third party. (para 31)

(8) The third party as sub-agent and not agent of plaintiff had no jurisdiction or right to appropriate the Sheriff's refund in the sum of RM1,350,595.20 on the excess Sheriff's commission which were trust monies belonging to the plaintiff. Clearly, the third party only had the right to look to the defendant for his proper remuneration and the defendant was accordingly liable to the plaintiff for its agent's misappropriation of the Sheriff's refund. (para 36)

(9) The final bill was not properly rendered under the 13th schedule of the 1988 Rules which as expressed in clear unequivocal language only applied to 'Debt Collection (Non-Contentious) Work'. The 1988 Rules did not exist at the date the defendant engaged the third party and the facts showed the case involved contentious work. Hence, the third party was not entitled to the final bill under the 13th schedule of the 1988 Rules. Apart from that, the amount of the bill was exorbitant. (paras 37, 38 & 39)

[Third party liable to indemnify defendant in the sum of RM900,000; counterclaim dismissed.]

Case(s) referred to:

Barclays Bank v. Tom 1 KBD [1923] 221 ***(refd)***
Calico Printers Association v. Barclays Bank 145 LT 51 ***(refd)***
Central Bank of India v. Firm Rur Chand Kurra Mal AIR [1958] Punj 159 ***(refd)***
De Bussche v. Alt 8 Ch D 286 ***(refd)***
Eden v. Weardale Iron & Coal Co Ch D Vol XXXV 287 ***(refd)***
Edison & Swan United Electric Light Company v. Holland CA [1889] Chancery Division Vol. XLI p 28 ***(refd)***
Hugh Francis Hoole v. Royal Trust Co 127 IC 529 ***(refd)***
Mahinder Das v. Mohan Lal 180 IC 617 ***(refd)***
Mercantile Bank of India v. Chetumal 126 IC 473 ***(refd)***
Montagu v. Forward [1893] 2 QB 350 ***(refd)***
New Zealand & Australian Land Co v. Watson 7 QBD 374 ***(refd)***
Re Eggertson v. Garland et al ([1926] 2 DLR 466 ***(refd)***
Re Simpkin Marshall Ltd [1959] Ch 229 ***(refd)***
RL Khanna v. The Simla Banking and Industiral Co Ltd AIR [1959] Punj 100 ***(refd)***
Schmaling v. Tomlinson 6 Taunt 147 ***(refd)***
Wray v. Kemp 26 Ch D 169 ***(refd)***

Legislation referred to:
Contracts Act 1950, ss. 143, 144, 145(1), (2), 147
Legal Profession Act 1976, s. 3
Limitation Act 1953, s. 3
Rules of the High Court 1980, O. 16 r. 3(3), O. 35A
Contracts Act [India], ss. 190, 191, 192, 194

For the plaintiff - Porres P Royan; M/s Shook Lin & Bok
For the 3rd party - Moses Susayan; M/s Moses Susayan & Assoc
For the defendant - K Anantham (CL Wong with him); M/s Skrine

Reported by Usha Thiagarajah

JUDGMENT

Vinceng Ng J:

[1] The plaintiffs' were the mortgagees of the vessels "JADE PHOENIX" and "GOLDEN PHOENIX" ('the said vessels') which were owned by the Phoenix Bulkship Company I, Inc. and the Phoenix Bulkship II, Inc respectively (hereinafter referred to as "The Phoenix Companies"). Upon default by the Phoenix Companies in the performance of their obligations to the plaintiffs, the plaintiffs sought to arrest and foreclose on the vessels. In or about May 1985, the defendants were retained by the plaintiffs to act for them in the proceedings and commenced to arrest and foreclose on the said vessels, which were laid off at the port of Labuan, East Malaysia. The defendants are a firm of advocates and solicitors in the States of Malaya entitled to practice law in the States of West Malaya only.

[2] On 7 June 1985, Admiralty Suits in Rem No. 2 and No. 3 of 1985 were filed in the High Court of Borneo at Kota Kinabalu for foreclosure of the said vessels. Subsequently, the plaintiffs here and defendants in the Admiralty Suits in Rem No. 2 and No. 3 of 1985 consented to judgment and the said vessels were eventually sold on 26 January 1990 through a public auction pursuant to an order of sale, which was conducted by and under the direction of the Sheriff. Both the vessels were successfully bidded for by the plaintiffs, as they were the sole bidders, at a credit bid of US$25.1 million.

[3] On 5 February 1990, the third party forwarded the Auctioneer's bills for the total sum of US$506,351 to the defendants and notified the defendants of the Sheriff's Commission of US$627,975, the quantum of which neither the defendants nor the plaintiffs queried. In May 1990, on behalf of the plaintiffs, the defendants remitted to the third party an aggregate sum of RM3,026,257.85 in full satisfaction of the Auctioneer's Fees (RM1,362,084.10) and Sheriff's Commission (RM1,664,173.75) on the auction sale. Accordingly, the third party disbursed the said sums and forwarded to the defendants, the receipts for such payments issued by the Auctioneer and the Sheriff.

[4] On 7 June 1990, the third party issued to the plaintiffs his professional bill ('the Bill') for US$300,000. No payment was made on the bill despite reminders and requests made to the defendants. Subsequently, on 23 March 1991, the third party sent a revised bill addressed to the defendants and the plaintiffs for the sum of US$531,000, (hereinafter referred to as 'the Final Bill'). The said Final Bill was to supersede the earlier Bill dated 7 June 1990, which was thereby withdrawn and cancelled. The Bill was based on the sum of US$25.1 million that was realised at the auction sale calculated in accordance with the 13th Schedule of the Sabah Advocates Remuneration Rules 1988. The Final Bill was sent to the defendants to be forwarded to the plaintiffs. According to the third party, the Bill was revised and replaced by the Final Bill because the rate of charges applied in the earlier bill dated 7 June 1990 for US$300,000 was in breach of and not in accordance to the 13th Schedule of the Sabah Advocates Remuneration Rules 1988, though it was issued by reference to the said Rules.

[5] By a letter dated 29 April 1991, addressed to the then third party's solicitors Messrs Skinner Lind Robertson, Willie & Wong, the plaintiffs, through their solicitors Messrs Allen Gledhill, denied any relationship between them and the third party and rejected any liability on the Third Party's Final Bill. *Vide* a letter dated 10 June 1991, the defendants also denied liability to pay the third party. Then, towards the end of September or early in October 1991, the Sheriff forwarded to the third party a sum of RM1,350,595.20 being the refund made to the plaintiffs on the excess of the Sheriff's Commission in respect of the auction sale. The third party notified the defendants of the refund by a letter dated 2 October 1991 and proceeded to apply the said refund of RM1,350,595.20 towards the set-off of his Final Bill.

The plaintiffs instituted a writ action against the defendants for:

a) Damages for loss occasioned from failure to advise properly on the commissions; and

b) Refund of the RM1,350,595.20, retained by the Third Party.

[6] The defendants then served a third party notice on the third party on 24 November 1994. During the course of this proceeding the plaintiffs and the defendants entered into a compromise and subsequently recorded a consent judgment, leaving only the defendants' claim against the third party and the counter claim by the third party to be determined by this court.

[7] At the outset, it is pertinent to note that when this matter proceeded to trial, the third party elected not to lead any evidence or to cross examine the defendants' witness Dato' Cecil Abraham ('CA'). Accordingly, CA's evidence through his witness statement affidavit marked as 'DW1A' – and filed under O. 35A of the Rules of the High Court 1980 – has been taken as unrebutted and accepted in toto by this Honourable Court. Thus this decision ought, in the peculiar circumstances of the trial, to turn on law and nexus among the three parties in the light of the agreed facts and uncontradicted evidence as between the defendants and the third party.

[8] So, the pith and kernal of the third party's case, is a case essentially based on law, unbuttressed by his oral evidence, where such evidence is necessary, and he did not even attempt to demolish the defendants' case on the facts through cross-examination. Evidence taking is all about truth, just simple truth and a judge is charged with the duty to discover the truth. True justice could only be dispensed by a judge possessed of a resolute determination to decide and write with a free mind, unencumbered by any desire for self aggrandisement or enslaved by the dictates from any quarter. In the current era even a 'slave' (one bereft of conscience or courage) is still free to choose his destiny and set a value to his name. A judge who betrays his oath of office must pay the most valuable currency that he has to offer: his credibility. Believe me – who has been in private legal practice for over 26 years – a judge of integrity and competence is assured of the fact that virtually all the litigants who fail in their cause in court after a fair hearing before him would have no complaints against the judge. It is the trust reposed in the judge that is the only source of the court's power.

[9] The party who fails to cross-examine and to take his stand in the witness box surrenders his right to require the court to evaluate the evidence to determine the truth, as the court would have to treat the oral evidence of his opponent as the whole truth. The essential gist of the oral evidence adduced by the defendants' witness in the case at hand is that the third party was, right at the outset appointed by them to act and had at all material times thereafter acted as, their agent in Sabah. In all my long and tired years on the bench I have yet to encounter this remarkable phenomenon, where having lost his client's support in a court-battle counsel soldiered on. Considering the inordinate number of frivolous appeals to the Court of Appeal these hard days of soft tries, I am inured against any surprises should this decision be appealed – unfortunately, a cynical litigant these days here may perceive the element of luck to be such a recognizable feature of their success. Be that as it may, due to an interesting aspect in the law of agency which arose during the trial, I felt sufficiently energised to pen this judgment.

[10] On the first day of the trial when the battle was scheduled to commence, the third party was personally present, but on the next day, when the trial commenced and the court made the observation on the absence of his client, counsel said: "Although the client is entitled to be in court now – he was in court this morning – he is not now present. I have told him to be present after lunch because he is ready and the Defendants have indicated this morning that this case should go on". Counsel then said: "he is now somewhere in town", and requested for an adjournment of the trial to the following day. This was denied.

[11] At the commencement of the trial both parties herein agreed that all the documents in the Agreed Bundle of Documents (ABD) and the Non-agreed Bundle of (NAB) are taken as read and admitted in evidence for the trial save that the documents in NAB are only admitted subject to cross-examination on their contents. In this regard it is important to observe that the third party neither submitted himself for cross-examination nor did he cross-examine the defendants' witness on any of the documents in NAB.

[12] The defendants contend that their right to indemnity from the third party is based on the principles of agency as they were in fact retained by the plaintiffs to act for them in the admiralty suits while the third party were appointed by the defendants as

their agents or local solicitors in Sabah, East Malaysia. Whereas the third party's case is that at all material times the plaintiffs were the clients of the third party and the defendants were merely instructing the third party for and on behalf of the plaintiffs thus falling squarely within s. 147 of the Contracts Act 1950. The defendants' contention is that as between them and the third party, the latter was at all material times acting as their agent, and *vis-à-vis* the plaintiffs the third party was a sub-agent. For the reasons aforesaid, I am constrained to adopt and accept as undisputed, all the facts deposed to by the defendants' witness, Dato' Cecil Abraham in his witness statement affidavit marked as DW1A, in the following language:

Q1. What is your connection with the Defendants?

A. I am one of the partners of the Defendant firm Shearn Delamore & Co (hereinafter referred to either as 'the Defendants' or 'SD'). I was the principal partner in SD who personally dealt with the Plaintiff in the matters relating to the arrest and sale of 2 vessels mortgaged to the Plaintiff, the Jade Phoenix and the Golden Phoenix since early May 1985. I have personal knowledge of the matters affirmed herein.

Q2. When and how were the Defendants appointed by the Plaintiff?

A(1) Pursuant to a telephone conversation I had with one David Schlitz of the Plaintiff's Office of Foreign Litigation on 8 May 1985, I received in writing from the US Maritime Administration (MARAD) to furnish them with a preliminary memo on the questions posed by them on the foreclosure of the 2 vessels (NAB 689-691).

(2) In MARAD's letter to SD dated 8 May 1985, they did ask for an estimate of attorney's fees. In SD's response dated 10 May 1985 we told them that attorney fees would depend on the work involved and may be around RM50,000.00. (NAB 692, 693, 695, 699, 700).

Q3. How did the third party Joseph Lee become involved in the matter?

A(1) Being instructed that the 2 vessels were anchored off Labuan in East Malaysia, we informed the Plaintiff that the action must be filed in the High Court of Borneo at Kota Kinabalu and that, for that purpose, we must

instruct solicitors in Kota Kinabalu. This was conveyed to the Plaintiff in our telex dated 13 May 1985 (NAB 697). In that telex we informed the Plaintiff that we need to instruct our agents in Sabah, East Malaysia.

(2) The Plaintiff did not object to us instructing solicitors in Sabah to act on its behalf.

(3) We instructed the third party, Joseph Lee (JL) as the local solicitors in Sabah to act on behalf of the Plaintiff in the foreclosure proceedings. One of our assistants Ms Rita Reddy flew to Sabah to brief JL immediately. I had worked with JL on previous matters and know him personally.

Q4. As far as SD was concerned, what was to be your role in the foreclosure proceedings and dealings with the Plaintiff?

A(1) As far as we were concerned, the firm as a whole has no right or entitlement to practice law in the State of Sabah as the jurisdiction of the High Court of Borneo (as it was known at that time – it is now known as the High Court of Sabah and Sarawak) and that the High Court of Malaya is distinct and different. We engaged JL to act as solicitor for the Plaintiff in the Admiralty Suits that were filed but at all material times, the intention was that I would apply for ad hoc admission to act as counsel in the Suits.

(2) JL filed the applications for the ad hoc admission of Ms Rita Reddy and myself to act as counsel in the Admiralty Suits filed. I was granted ad hoc admission to act as counsel but the application for Ms Rita Reddy's ad hoc admission was not granted. (NAB 243-244). On 30 July 1985, I was granted permission to practise as an advocate in the State of Sabah in connection with the Admiralty Suits.

(3) So, it was understood that I would be the counsel for the Plaintiff in the 2 Admiralty Suits, with JL acting as the solicitors on record for the Plaintiff.

(4) In addition to my acting as counsel in hearings in the Admiralty Suits, SD would play the role of intermediary for *inter alia* the payment of fees and disbursements, the onward transmission of instructions and advice between the Plaintiffs and JL and SD would be responsible for the preparations, drafting and settling of the various

documents and pleadings in the Admiralty Suits and to advise on matters pertaining to the law and facts insofar as they related to admiralty matters, as the relevant admiralty laws applicable to the Plaintiff's proceedings in Sabah are materially the same as the admiralty laws in West Malaysia.

(5) All cause papers, affidavit and other documents filed in the Admiralty Suits were filed by JL and bore the name of JL as the solicitors for the Plaintiff. Some of the relevant papers in the Suits can be found at ABD 300-626. Notwithstanding that all those papers and documents bore the name of JL as the Plaintiff's solicitor, it is the fact that everything was drafted by SD and, in effect, JL's role at all material times was not much more than acting as a postman and communicating with the Court with regard to the obtaining of early hearing dates and so on. I appeared as counsel for all of the hearings and argued on behalf of the Plaintiff.

(6) In most of our letters to the Plaintiff, we had referred to JL as "our agent" or "the/our local solicitor".

Almost all of the communication was between SD and the Plaintiff. There was one occasion very early on when the Plaintiff communicated directly with JL. That was in a telex dated 11 June 1985 (ABD 99B). Thereafter, all communication in relation to the Admiralty Suits was between the Plaintiff and SD on the one hand and SD and JL on the other.

Other than that, there was hardly any contact between the Plaintiff and JL although there was one time, just prior to the commencement of the auction in January 1990 SD had requested that the Plaintiff join in a telephone conversation with us, JL and the lawyers for Bankers Trust to go over questions about timing and other administrative matters related to the day of the auction.

It was quite clear that it was SD who had the direct contact with JL and who had control over what JL did, although I must reiterate that insofar as the law in Sabah differs from that in West Malaysia, SD would have to rely on JL's advice.

Q5. On what basis did SD bill the Plaintiff for services rendered?

A(1) At all times, SD billed the Plaintiff on the basis of the work done and on hourly basis. Save for the final bill, the Plaintiff had never objected to the bills raised by SD.

Q6. What about JL's bills?

A(1) Some of JL's bills were addressed to the Plaintiff and some to SD. JL's bills which were addressed directly to the Plaintiff are at NAB 1549-1557. Those addressed to SD are at NAB 1578-1586. One bill dated 7 June 1990 was addressed to SD but that was subsequently cancelled by JL and superseded by the final bill issued by him dated 23 March 1991. This final bill ('the Bill') was addressed to both SD and the Plaintiff. (NAB 1586 A-H)

(2) Without exception, all the bills raised by JL were forwarded by SD to the Plaintiff and, save for the Bill, all were paid by the Plaintiff. The payments were then forwarded by SD to JL.

As an illustration, on 25 June 1985, immediately following the arrest of the vessels on 18 June 1985, we had forwarded to the Plaintiff our own "interim bills for work done to date" and also enclosed therewith "our agent's interim bill". We asked the Plaintiff to kindly make out a draft in JL's favour for the total amount in Malaysian dollars and send the same to us for our onward transmission to them. (NAB 766)

Prior to the disputes with regard to the Bill, there was no issue as to who was liable to JL for his fees.

Q7. Was there any agreement between SD and JL as regards how he would bill for work done by him?

A(1) There was no express agreement but I assumed at all material times that JL would , like SD, bill according to the work involved. Certainly there was no indication by JL that he would bill according to any fixed scale of fees. Also, with the exception of the Bill, the various interim bills raised by JL (and which were paid without any query by the Plaintiff) were not based on any fixed scale. Although there was mention of the Sabah Advocates Remuneration Rules 1981 in the bills for fees

raised by JL (NAB 1549-1557, 1578-1586), JL never purported to rely on any particular Schedule of the said Rules. That is, with the exception of the Bill.

Q8. Were you aware of the Sabah Advocates Remuneration Rules 1988?

A(1) Not at the time when JL was instructed to act as the Sabah solicitors for the Plaintiff. The 1988 Rules were not in existence at the date of his appointment in 1985 and he had never previously rendered any bill pursuant to any Remuneration Rules or indicated that he would bill under any fixed scale. The first time JL indicated to me that he was apparently entitled to bill under the 1988 Rules was at a meeting at SD's office on 2 March 1990. I did not agree that he was entitled to bill under the 1988 Rules or any particular Schedule thereunder. I did not have any knowledge of the contents of the 1988 Rules or their applicability at the time. I asked him for a copy of the 1988 Rules and he sent the copy to me vide his letter dated 26 March 1990.

Q9. Were the Admiralty Suits contested?

A(1) Yes, they were. The Defendants in both the actions had filed a Defence and Counterclaim. There was an interlocutory application filed on behalf of the Plaintiff for the appraisal and sale of the 2 vessels. That application was contested by the Defendants and numerous Affidavits were filed. The High Court Judge ruled against the Plaintiff and a Notice of Appeal was filed by JL on behalf of the Plaintiff to the Supreme Court. It can also be seen from the Grounds of Judgment of that decision that the actions were defended (ABD 325).

(2) Subsequent to the filing of the Notice of Appeal, the parties agreed to enter consent judgment and an application for leave to enter consent judgment was filed by JL on behalf of the Plaintiff and consent judgment entered accordingly. But yes, the Admiralty Suits were contentious.

Q10. What happened in the Admiralty Suits after consent judgment was entered?

A(1) The vessels were sold through a public auction pursuant to an Order of Judicial Sale on or about 26 January 1990. The sale was conducted by and under the direction of the Sheriff of the High Court at Kota

Kinabalu. Special phone lines were set up so that the Plaintiff could bid at the auction. The vessels were successfully sold to the Plaintiff, at a credit bid of USD25.1 million.

Q11. What happened thereafter?

A(1) By letter dated 5 February 1990, JL forwarded to SD the report of the auctioneer and their bills which amounted to the sum of USD506,351.00. In his letter, he advised that, in addition to the fees and disbursements of the auctioneers, the sheriff's commissions payable must also be paid before the vessels could be released. The commissions are 5% on the first USD1,000.00 and 2 ½% upon all above that sum. Based on the purchase price of USD25.1 million, JL advised that the commission amounted to USD627,975.00.

Q12. What did you do?

A(1) We forwarded the auctioneer's bill and JL's letter to the Plaintiff for payment to be made. We relied on JL's advice as to the amounts payable before the vessels can be released as he was the solicitor in Sabah and the entitlement of the auctioneer to his fees would be a question of Sabah law.

(2) In order to have the Bill of Sale executed and the vessels released, we had requested the Plaintiff to make the payments for the auctioneer's fees and sheriff's commission and the payment was eventually paid by the Plaintiff in the sum of USD 506,351.00 (then equivalent to RM1,362,084.10) and USD627,975.00 (RM1,664,173.15). The receipts for these are in NAB 1410-1412.

Q13. Did you query JL's advice as to the different amounts payable for the sheriff's commission and auctioneer's fees?

A(1) We did not query his advice as he was supposed to know the law applicable in Sabah and we were of the view that the question of what was properly payable in terms of the auctioneer's fees and sheriff's commission in order to obtain a release of the vessels was a question of Sabah law.

Q14. Please elaborate on the events leading to the Bill issued by JL. A

A(1) As I have earlier stated, it was only at a meeting in SD's office on 2 March 1990 that JL first mentioned the 1988 Rules. Prior thereto, JL has never charged pursuant to any fixed scale or schedule but on the basis of work done. I asked him for a copy of the Rules and he forwarded it to us in a letter dated 26 March 1990 (ABD 72). In that letter, he stated that based on the 12th Schedule of the 1988 Rules, his fees will be USD267,765.00. Based on the 13th Schedule, it will be USD528,000.00. He stated that he was prepared to go under the 12th Schedule. B C

(2) JL then issued a bill dated 7 June 1990 addressed to SD for fees of USD300,000.00 (ABD 215) which we forwarded to the Plaintiff for its further action. D

(3) When that bill was not paid by the Plaintiff, JL wrote us several reminders dated 15 September 1990, 15 October 1990 and 21 December 1990 for payment by the Plaintiff (ABD 87, 88 and 90). E

(4) In a letter to JL dated 27 February 1991, SD informed JL that the Plaintiff regarded his fees as too high and that the Plaintiff has suggested a sum of RM100,000.00 in full and final settlement of his fees. (ABD 91)

(5) JL then sent another bill dated 23 March 1991 ('the Bill') for the revised fee of USD529,000.00 which he alleges he was entitled to charge under the 13th Schedule to the 1988 Rules. (ABD 222 - 229). The Bill was to supersede the earlier bill dated 7 June 1990. The Bill was addressed to both SD and the Plaintiff. The accompanying letter dated 25 March 1991 sent to SD by JL's solicitors Skinner Lind Robertson Willie Wong & Chin is at ABD 185-186. F G

(6) Both the Plaintiff and SD disputed JL's entitlement to charge what he did in the Bill. H

(7) In a letter dated 10 June 1991 to JL, SD had disputed the Bill. SD's contention was that the 1988 Rules were not applicable and, even if applicable, the 13th Schedule was only applicable for non contentious debt recovery matters and not for contested admiralty actions. SD in this letter also stated clearly that no undertaking express or implied was ever given by us as regards fees by SD on behalf of the Plaintiff. (ABD 189 - 190) I

(8) In a letter dated 2 October 1991 to the Plaintiff's solicitors Allen & Gledhill Singapore (A&G), JL insisted that he was the agent and solicitor for the Plaintiff and entitled to charge as per the Bill. (ABD 192-194). He informed A&G that the sheriff has refunded a sum of RM1,350,595.20 ('the Refund') being the amount overpaid and he has set off the Refund against the amount in the Bill, leaving a balance of RM145,687.60 which he demanded from the Plaintiff.

(9) The Plaintiff through A&G had informed JL that the Refund belonged to the Plaintiff and JL had no right to utilise the same in settlement of a bill which was being disputed both as to liability and quantum (ABD 195). JL responded to reiterate his right of set off and said he considered the matter closed except for his balance fee of RM145,687.60

(10) There followed a series of correspondence between SD, A&G, the solicitors in Sabah appointed to act on behalf of the Plaintiff Jayasurya Kah & Co (JK) and JL and his solicitors (NAB 561 - 677). There were discussions between us and the Plaintiff to file action against JL and to obtain a mareva injunction against him as our information was that he was a permanent resident of Australia. We even got so far as to forward the draft claims and applications to JK (NAB 609-610; 622-623).

(11) In a letter to JL dated 3 October 1991 (ABD 96) we had put JL on notice that the monies returned to him by the sheriff amounting to RM1,350,595.20 are "monies belonging to our clients (the Plaintiff) and therefore are trust monies to which you have no legal right to set-off against your fees".

(12) In another letter to JL dated 8 October 1991 we reminded JL that we had previously indicated that he may proceed to tax the Bill but nothing had happened thus far (ABD 97-98)

(13) At one time, JL was prepared to have the Bill taxed by the Court provided the Plaintiff acknowledged that his firm was acting for them in the Admiralty Suits. (NAB 629). The Plaintiff insisted that it had no direct relationship with JL (NAB 631; 634).

(14) Since the Plaintiff did not really dispute its liability to pay the reasonable legal fees of JL, this would have been a good opportunity to resolve the issue once and for all, by having JL tax the Bill.

(15) On 7 February 1992, SD wrote to A&G to say that the parties are now presented with an opportunity to resolve the question of JL's fees by way of taxation and asked for instructions to indicate to JL that he may proceed with the same (NAB 638 - 639)

(16) In a telefax dated 11 February 1992, the Plaintiff through its solicitors took the view that it had no objection to the Bill being taxed by the Court but said that if the taxation does not result in the recovery of the Refund, the Plaintiff may look to SD for reimbursement. (NAB 641; 642)

(17) In a telefax dated 14 February 1992 to A&G, SD clarified the position that the idea of taxation was to ensure that JL only gets what the Court thinks is reasonable and the only reimbursement the Plaintiff may expect would be the difference between the amount awarded and the amount retained by him. SD said that since the Plaintiff has given the go ahead for the taxation, we will convey the consent to Mr Alex Decena of JK for his further action. (NAB 643 -644).

(18) We requested JK to proceed to request JL to tax the Bill (NAB 645) JK did so in a letter dated 2 March 1992 to JL (ABD 199). JL responded on 18 March 1992, asking to know who JK act for and a copy of their retainer (NAB 649)

(19) SD was very anxious to have the Bill taxed but the Plaintiff was reluctant to give the letter of authority or retainer letter in respect of their appointment of JK. In the end the Plaintiff never gave the letter of authorisation or retainer and the Bill was not taxed. The correspondence between SD, JK and A&G on this issue can be seen at NAB 650-677. Then SD received a letter before action on 24 November 1993 from the Plaintiff's solicitors in this action. (NAB 678-680)

Q15. Did SD ever give JL any undertaking to pay his fees?

A(1) SD's position is that no such undertaking was ever given. However, we did give JL certain limited undertakings to pay certain of his outlays and fees. For instance, on 6 September 1989, SD had written to JL

asking him to file, on an urgent basis, copies of the Certificate of Urgency in my name in conjunction with the Summons For Directions. (ABD 60). We stated therein we undertook to pay his costs. But that was only in relation to the filing costs for the Certificate of Urgency and not his legal fees in relation to the Admiralty Suits.

(2) Notwithstanding that, however, I would say that if JL was the sub-agent of SD, then SD would be liable to pay his fees, although the understanding was that the Plaintiff would ultimately be liable for such fees, provided they are reasonable in view of the work done by JL.

Q16. As far as SD is concerned, was JL entitled to bill under the 13th Schedule of the 1988 Rules?

A(1) No. Even if the 1988 Rules were to be applicable and compulsory (and there is no evidence that it is compulsory to bill under the Rules; when JK were appointed to act on behalf of the Plaintiff in Sabah after the dispute regarding the Bill arose, their fees were one time basis and not pursuant to any fixed scale), the 13th Schedule could not possibly be applicable. I have earlier explained that the Admiralty Suits were contested actions and clearly the only applicable Schedule, if any, would have to be the 16th Schedule. The only way of ascertaining, at that time, what would have been a reasonable fee to be charged by JL commensurate with the work involved would have been to have the Bill taxed by the Sabah Court. It was not the fault of SD that the Bill was never taxed. SD did ask JL to tax the Bill but JL had always maintained the stand that SD had no locus to do so. That is also pleaded in JL's Defence herein.

Q17. How much did SD bill the Plaintiff in relation to work done in respect of the 2 Admiralty Suits?

A. Altogether we have issued 3 invoices for work done as follows:

1) Invoice No.004883 dated 24/6/1985, fees in the amount of RM30,010.00;

2) Invoice No.A04008 dated 2/5/1986, fees in the amount of RM20,025.00; and

3) Invoice No.A86564 dated 5/12/1991, fees in the amount of RM162,020.00 [See NAB 1589 – 1622]

> As can be seen from the defendants' counterclaim, the last invoice was not paid by the plaintiff. The plaintiff had paid the first 2 invoices (See NAB 1575-1577). The payments reflected in the statement of accounts at NAB 1575-1577 in respect of the first 2 invoices included some disbursements.

[13] In the premises, based on all the aforesaid uncontroverted facts and circumstances deposed to in 'DW1A' the defendants submitted that the third party is liable to indemnify the defendants for the said judgment sum of RM900,000 paid by the defendants to the plaintiffs and for all costs incurred by the defendants in the proceedings herein.

[14] The third party had, somewhat belatedly, on 6 June 2006, submitted in writing, that since he became a party to the main action, as soon as the third party notice was served on him, he may rely on any statements averred to in the pleadings between the plaintiffs and the defendant without further proof or evidence to establish such averments including admissions. As the third party did not adduce any evidence, either *viva voce* or by way of witness statement of affidavit or affidavits under O. 35A of the Rules of the High Court 1980, the resolution of this issue would have an important bearing on the third party's case, and I would therefore purpose to first deal with this point in my grounds of judgment.

[15] I shall now discuss the law on this feature of the third party's case. In *Barclays Bank v. Tom* 1 KBD [1923] 221 (CA) at p 223 Scrutton LJ had this to say:

> … Now I think it is important to keep clearly in mind what the third party procedure is. A Plaintiff has a claim against a defendant. The defendant thinks if he is liable he has a claim over against a third party. With that matter between the defendant and the third party the Plaintiffs has obviously nothing to do. He is not concerned with the question whether the defendant has a remedy against somebody else. His remedy is against the defendant. But the defendant is much interested in getting the third party bound by the result of the trial between the Plaintiffs and himself, for otherwise he might be at a great disadvantage if, having fought the case against the Plaintiffs and lost, he had then to fight the case against the third party possibly on different materials, with the risk that a different result might be arrived at. The object of the third party procedure is then in the first place to get the third party bound by the decision between the Plaintiffs and the defendant. In the next place it is directed to getting the question between the defendant and the third party decided as

soon as possible after the decision between the Plaintiffs and the defendant, so that the defendant may not be in the position of having to wait a considerable time before he establishes his right of indemnity against the third party while all the time the Plaintiffs are enforcing their judgment against the defendant. And thirdly, it is directed to saving the extra expense which would be involved by two independent actions. With these objects in view the third party order usually provides that the third party may appear at the trial between the Plaintiffs and the defendant. When the third party has so appeared as party to the proceedings, various questions arise as to what he can do. Can he counterclaim against the Plaintiffs? The answer is no, for such a counterclaim would have nothing to do with the issue in the action to which he is admitted as a party: *Eden v. Weardale Iron and Coal Co.* [1887] 35 Ch. D 287.

The defendant says, 'You owe me so much by way of contribution or indemnity.' How may the third party defend himself? Of course he may deny that he is under any such liability at all. But he may admit his liability and say that he has a cross-claim against the defendant which prevents any effective judgment being given against him. He may say, 'Your right to contribution will result in 100% being due from me to you, but I have a set-off in another matter in respect of which 100% will be due from you to me.' Or again he may, which admitting his liability to contribution, say that he has a claim against the defendant which cannot be made the subject of a set-off but will result in the defendant having to pay him so many pounds. It seems to me that the proper view to take on this part of the third party procedure is that taken by Cozens-Hardy LJ in *McCheane v. Gyles* [1902] 1 Ch. 287, 301 – namely, that 'The Act treats the third party procedure as analogous to a cause instituted by the defendant as Plaintiffs against the third party,' with the consequence that the defendant in an action at the suit of a Plaintiffs may defend himself, among which modes of defence is included the making of a counterclaim. For these reasons it appears to me that Greer J. came to a right decision and that the appeal must be dismissed.

And Eve J had this to add:

I respectfully agree with the view expressed in *McCheane v. Gyles* [1902] 1 Ch. 287, 301 that the Judicature Act, by which the third party procedure was created, treats that procedure 'as analogous to a cause instituted by the defendant as Plaintiffs against the third party.' It is clear that the service of the third party notice does not constitute the person on whom it is served a defendant to the action, but it seems to me that it does make him a defendant

> quoad the person serving the notice. And that seems to be the reasonable view to take, because the main object of the procedure was to prevent the necessity for two actions. In the main action the rights of the Plaintiffs and the defendant are determined without reference to the defendant's claims over against the third party, but when those rights have been ascertained it is then open to the person brought in by the third party notice to have all relevant disputes determined between him and the person serving the notice. I think that a third party being in the position of a defendant in relation to the person who served the notice is entitled to counterclaim against him.

In *Eden v. Weardale Iron & Coal Co.* Ch. D. Vol XXXV 287, at p 291 Cotton L.J. had this to say:

> In my opinion it cannot be said that the third party, as such, is a defendant within the interpretation clause, but it may be that an order may be made (eg that the third party could be interrogated by the Plaintiffs) as regards the person who is brought in as a third party, which puts him as between himself and the Plaintiffs in the position of being defendant in the action, the Plaintiffs being the person who is claiming as against him. Now what was the order of the 17 March 1885? It was an order (to interrogate) obtained by the Ecclesiastical Commissioners which materially altered their position in the action from that which it was previously to that order.

And further in his lordship's judgment he added:

> ... I quite agree that, as between the Plaintiffs and the third parties, that did not put them in the position of being, as regards the Plaintiffs in the action, his Defendants. That was not bringing him, in the sense of opposite parties, as Defendants. But that is entirely different from the question which we have to decide when the order of the 17th of March (order to interrogate) had, as we decided on the application of the Plaintiffs, put them in the position of apposite parties, parties having an issue to try with the Plaintiffs; and, in my opinion, that brought them within the meaning of the word "defendant" in the interpretation clause by entitling them to appear hostilely (as opposite or opposing parties to the Plaintiffs) at the trial of the action to try an issue with the Plaintiffs.

In *Edison & Swan United Electric Light Company v. Holland* C.A. 1889 Chancery Division Vol. XLI p 28, at p 32 Cotton LJ had this to say:

A curious point has been raised after judgment in this case. The Plaintiffs now asked the court to treat the third parties in this action as if they were defendants to the action, not only to the extent of making them pay costs, but also to the extent to granting relief by way of injunction. That, however, would, I think, be wrong, because the third parties are not in reality defendants.

[16] The third party is not, in my view, a party to the action between the plaintiffs and the defendants but only a party *vis-à-vis* the defendants and the third party. This is obvious in the light of O. 16 r. 3(3) of the Rules of the High Court 1980 ('RHC'). The precise wording of this provision reads as follows (with the crucial words highlighted):

> (3) Subject to the foregoing provisions of this rule, the following provisions of these rules, namely, Order 6 rule 6(3), Order 10 (except rule 1(4), Order 11, Order 12 and Order 70 rule 3, **shall apply in relation to a third party notice** and to the proceedings begun thereby **as if**
>
> (a) **the third party notice were a writ** and the proceedings begun thereby an action; and
>
> (b) **the defendant issuing the third party notice were a plaintiff and the person against whom it is issued a defendant in that action.**

[17] However, if the plaintiffs had amended and made the third parties defendants or if the third parties had applied to be added as defendants and such order was made, the position would have been different. The trite principle that parties to an action are circumscribed by their pleadings governs only the pleadings *vis a vis* the plaintiff and defendant separately from that between the defendant and the third party. In any event, notwithstanding this observation, it is important to bear in mind the distinction between affidavit or oral evidence adduced on oath and unsworn pleadings, which constitute mere statements of each party's case to that could only be crystalised by sworn evidence. This being the case, though their collective testimonies on oath in court could be used by the plaintiff, the defendant and the third party to argue on the strength of their respective cases, it is beyond question that averments in pleadings could not be so used, least of all could the third party hold the defendant as being bound or circumscribed by his averments in pleadings made as between the

defendant and the plaintiff and invoke such pleadings in his favour. This is what the third party in the instant case has sought to do.

[18] Thus, I hold that the third party is not entitled to use in his favour, any admitted facts even if found in the pleadings which are mere averments between the plaintiffs and the defendant, and he is still obliged to adduce evidence on oath to support his case.

[19] The following are the agreed issues for this court's determination. On issue A: Whether the Third Party is sub-agent of the Defendants and no privity of contract has arisen between Third Party and Plaintiffs.

[20] It is the defendants' submission that, on the undisputed facts of this case, the third party was their agent (or the plaintiffs' sub-agent appointed by the defendants who were the plaintiffs' agent) and accordingly liable to them and to account to them for all his acts including the mis-appropriation of the refund which are trust monies belonging to the plaintiffs and which the third party had no right to appropriate or purport to set-off towards his bill, the liability and quantum of which had been disputed by both the plaintiffs and the defendants.

The Law

[21] Sections 143, 144 and 145 of our Contracts Act 1950 are in *pari materia* with ss. 190, 191 and 192 of the Indian Contracts Act. The relevant provisions are set out below:

> **S. 143 (in *pari materia* with s.190 of the Indian Contracts Act)**
>
> When agent cannot delegate
>
> An agent cannot lawfully employ another to perform acts which he has expressly or impliedly undertaken to perform personally, unless by the ordinary custom of trade a sub-agent may, or from the nature of the agency, a sub-agent must, be employed.
>
> **Section 144 (in pari materia with s. 191 of the Indian Contracts Act)**
>
> 'Sub-agent'
>
> A "sub-agent" is a person employed by, and acting under the control of, the original agent in the business of the agency.

Section 145 (in *pari materia* with s. 192 of the Indian Contracts Act)

Representation of principal by sub-agent properly appointed

(1) Where a sub-agent is properly appointed, the principal is, so far as regards third persons, represented by the sub-agent, and is bound by and responsible for his acts, as if he were an agent originally appointed by the principal.

Agent's responsibility for sub-agent

(2) An agent is responsible to the principal for the acts of the sub-agent.

Sub-agent's responsibility

(3) A sub-agent is responsible for his acts to the agent, but not to the principal, except in case of fraud or wilful wrong.

Law On Agency

[22] The following principles of law governing the above provisions can be gathered from the commentary on the Indian Contracts Act by Subrahmanyam & Singhal:

a) An agent may not, as a rule, employ another person to do that which he has expressly or impliedly undertaken to perform personally unless:

i) by ordinary custom of the trade a sub-agency may be employed; or

ii) from the nature of the agency a sub-agent must be employed.

b) The authority of the principal to appoint a sub-agent is implied inter alia where the act to be done is purely of a ministerial nature and does not involve confidence or the exercise of discretion; for it is only when the authority is coupled with a discretion or confidence that it must be executed by the agent in person.

c) The disability of an agent to engage a sub-agent, or to delegate his powers or duties to another person, is confined to acts which require the exercise of some judgment, or discretion or personal skill, and does not extend to acts which are merely of a ministerial or clerical or mechanical nature, inasmuch as the general rule on which it is based does not

exist in such cases and the power to delegate the duties or to employ a sub-agent is implied for the performance of such acts.

d) Where an agent is employed to do acts which do not call for the existence of judgment or discretion – acts in the performance of which the element of trust or confidence does not exist – acts where the agent has already exercised his judgment or discretion and determined upon their propriety – the agent may delegate to another or to a sub-agent the execution of merely mechanical, clerical or ministerial acts involving no judgment or discretion.

e) As a general rule, an agent cannot, without authority from his principal, devolve upon another, obligations to the principal which he himself has undertaken to fulfil personally. (*Mahinder Das v. Mohan Lal* 180 IC 617; AIR [1939] A 188). Even where, after employment of the sub-agent, he and the principal correspond directly, that fact does not convert the sub-agent into a substituted agent spoken of under s. 147 of our Contracts Act (Indian Contracts Act, s. 194). Nor does mere knowledge of the principal regarding the sub-agency create any direct privity of contract between the principal and the sub-agent. But, in special circumstances, it is permissible for the agent to appoint a substitute who would be responsible to the principal in the same way as the agent himself. Such a substitute is not a sub-agent but an agent of the principal.

f) Section 143 (Indian Contracts Act, s. 190) lays down that, ordinarily, an agent may not delegate his powers or duties to another person, if he has undertaken to exercise or perform them himself personally unless he has express or implied authority from his principal to do so. Whenever delegation is authorised and is duly exercised, a legal relationship is created between the principal and the substitute. Besides the relationship of principal and agent is created between the agent and the person to whom he delegates his powers or duties.

g) Section 144 (Indian Contracts Act, s. 191) defines a sub-agent to be a person employed by and acting under the control of the original agent in the business of the agency. An essential feature of the sub-agency is that the sub-agent:

A

i) is employed by the original agent in the business of the agency; and

ii) acts under the control of the original agent in the business of the agency.

B

h) Because of this second feature, there is no privity of contract between the principal and the sub-agent, and the sub-agent does not become the agent of the principal. (*New Zealand & Australian Land Co v. Watson* 7 QBD 374 (CA); *Montagu v. Forward* [1893] 2 QB 350 (CA); *Calico Printers Association v. Barclays Bank* 145 LT 51 (CA))

C

i) Sub-agents employed with the express or implied authority of the principal, between whom and the principal there is no privity of contract, are governed by the provisions of ss. 144 and 145 of our Contracts Act.

D

j) Where an agent appoints a sub-agent and deals in the business of the agency through such a sub-agent, and loss accrues on account of an act of the sub-agent and the agent becomes responsible for that loss, the principal can recover that loss from the agent but not from the sub-agent, unless a privity is established between him and the sub-agent. As between the agent and the sub-agent, the loss falls on the sub-agent and the agent can recover the same from him. (*R.L. Khanna v. The Simla Banking and Industiral Co Ltd* AIR [1959] Punj 100).

E

F

k) The question whether a person is an agent and another person is a sub-agent depends on the facts and circumstances of each particular case.

G

l) Section 145 (s. 192 of the Indian Contracts Act is confined to the case of a sub-agent as defined in s. 144 provided that he is a properly appointed sub-agent and his appointment is not vitiated by s. 143 (Indian Contracts Act, s. 190). The appointment of a sub-agent is not vitiated by the provisions of s. 143 (Indian Contracts Act, s. 190) if *inter alia* the acts for the performance of which the sub-agent has been appointed are those which, though the agent had undertaken to perform personally, the appointment of the sub-agent has been made by the agent with the authority, express or implied of the principal.

H

I

m) Where a sub-agent is properly appointed, the following consequences ensue:

i) the principal is, so far as regards third persons, properly represented by the sub-agent, and is bound by, and responsible for his acts as if he were an agent originally appointed by the principal; in other words, the acts of the sub-agent bind the principal within the scope of the sub-agent's authority;

ii) the agent becomes responsible to the principal for the acts of the sub-agent;

iii) the sub-agent becomes responsible for his acts to the agent, but not to the principal, except in case of fraud or wilful wrong; where a fraud or wilful wrong is committed by the sub-agent, the principal has an option to hold either the agent or the sub-agent responsible for the act or he may hold both of them responsible.

n) Section 145 (Indian Contracts Act, s. 192) declares *inter alia* that notwithstanding the appointment of a sub-agent, the agent continues to be responsible to the principal for the acts of the sub-agent. Every agent who employs a sub-agent becomes liable to the principal for money received by the sub-agent to the principal's use and also becomes responsible to the principal for the negligence and other breaches of duty of the sub-agent in the course of his employment. (*Hugh Francis Hoole v. Royal Trust Co* 127 IC 529; AIR [1930] PC 274).

o) Except where privity of contract is established, and the sub-agent thus becomes the agent of the principal, in all other cases, the agent is responsible to the principal for the act of the sub-agent. (*New Zealand & Australian Land Co v. Watson* 7 QBD 374 (CA)).

p) So where a person, employed to receive money for another, employs a third person to receive it for him, proof of the money having come into the hands of such third person is sufficient to charge the person who employed the third person with receipt and the mere fact that the employment of such third person by the agent was known to the principal does not affect the agent's liability. So if the sub-agent converts the goods to his own use the agent is responsible to the principal for the damage caused by such conversion although the

principal has a right to follow the goods in his sub-agent's hands, if he misappropriates them. *(New Zealand & Australian Land Co v. Watson) (supra)*.

q) Ordinarily there is no privity of contract between a principal and his sub-agent as such, and the rights and duties arising under the contract between the principal and agent and between the agent and sub-agent respectively are only enforceable by and against the immediate parties thereto. *(New Zealand & Australian Land Co v. Watson) (supra)*.

r) So, generally, a principal has no claim against the sub-agent for the moneys in the latter's hands, he being responsible for them only to the agent. But wherever privity is established between the principal and the sub-agent, the latter becomes, in effect, the agent of the principal.

s) Section (Indian Contracts Act, s. 192) lays down the principle that there is no privity of contract between a sub-agent and the principal, and that the sub-agent is responsible for his acts only to the agent and not to the principal. To saddle the sub-agent with liability the principal must establish privity or some other relationship entitling him to do so. The section, however, contemplates that a privity of contract is not established between the principal and the sub-agent in consequence merely of his appointment as such. (*Mercantile Bank of India v. Chetumal* 126 IC 473; AIR 1930 Sind 247).

t) The scope of s. 147 of our Contracts Act (Indian Contracts Act, s. 194) embodies the theory of what is generally known as substituted agency. What the section envisages is an agent nominating another person to act for the principal in the business of the agency with the knowledge and consent of the principal. It is applicable only when the agent names another, and when that is accepted, the agent has no concern thereafter with the business transactions between the principal and the person named. Thereafter the agent walks out of the scene.

u) As a rule, an agent cannot establish the relationship of principal and agent between his own principal and a third person, and an agent cannot without authority from his principal, devolve upon another, obligations to the principal which he has himself undertaken to personally fulfil; and, inasmuch as confidence in the particular person employed is at

the root of the contract of agency, such authority cannot be implied as an ordinary incident in the contract. (*De Bussche v. Alt* 8 Ch D 286, 310).

v) The fact that the agent was expressly or impliedly authorised to employ another does not affect the question but what has to be determined is: whether the agent was authorised to employ him as his own assistant or agent or as the assistant or agent of the principal? To create privity of contract between the principal and the person employed, it is not sufficient that the principal has consented to the appointment, inasmuch as the principal may consent to the appointment of a person as his own agent or as the sub-agent. Consent to delegation is not the same as the consent to subsitute, and it is the latter which creates privity of contract. (*Central Bank of India v. Firm Rur Chand Kurra Mal* AIR [1958] Punj 159).

w) Whenever there is a question of privity of contract, it resolves itself into: whether the principal consented, expressly or impliedly, to the appointment of the person selected by the agent as his own agent, or only as the agent's agent, or in other words, whether the person employed by the agent acted under the control of the principal or of the agent. If, from the facts and circumstances of a particular case, it appears that the agent employed the person for the principal and, by his authority express or implied and he is subject to the principal's control, then he is the agent of the principal and there is privity of contract between him and the principal. But if, on the other hand, the agent, having undertaken to transact the business of his principal, employed the sub-agent on his own account to assist him in what he has undertaken to do, even though with the consent of the principal, the risk is his, and there is no privity of contract between such a sub-agent and the principal and the sub-agent is the agent of the agent only. (*New Zealand & Australia Land Co v. Watson* 7 QBD 374 (CA)).

x) Where the employment of the sub-agent is within the knowledge of the principal, or he has consented to the same, there is no question of privity of contract, inasmuch as there is not even possibility of its existence in such a case. (*Schmaling v. Tomlinson 6 Taunt* 147; *Wray v. Kemp* 26 Ch D 169).

Thus, after distillation of the welter of statements on the law of agency above, my view is that the question whether a party is an agent or sub-agent or substituted agent of the principal would largely resolve itself into: whether and to what extent the principal has control or direction over the party.

Application Of Law To Undisputed Facts Of This Case

[23] Applying the above principles of law to the undisputed facts of this case, the defendants argued, quite persuasively I would say, that there was no privity of contract between the plaintiffs and the third party as the plaintiffs was the principal of the defendants. They based their arguments on the following factual matrix:

a) the third party was appointed by the defendants (and not the plaintiffs) for the purposes of acting as the defendants' agent; clearly the plaintiffs never expressly or impliedly consented to the third party being appointed as the substitute agent of the plaintiffs;

b) in appointing the third party to act as the solicitor on record in the admiralty suits and as 'a postman', for ministerial, clerical and mechanical acts, the defendants were clearly not acting in breach of the non-delegation doctrine;

c) at all times, all the work was actually done by the defendants and, in particular, CA who was admitted to practise as an advocate in the admiralty suits, and did all the work and attended and argued all hearings;

d) there was no direct contact between the plaintiffs and the third party;

e) the defendants exercised sole control over the third party, whereas the plaintiffs had no control over the third party; this element of control is a most important factor and shows *inter alia* that the third party was indeed the agent of the defendants and the sub-agent rather than the substituted agent of the plaintiffs;

f) since the third party was merely acting as 'a postman', and his acts were ministerial, clerical or mechanical in nature, there is no way in which he could be said to be the agent on the conduct of the admiralty suits as an advocate in any sense of the word.

[24] The following passage in *"The Law of Advocates and Solicitors in Singapore and West Malaysia"* by Tan Yoke Lin is, I think, pertinent:

> *Wray v. Kemp* is illustrative of the problem posed by those cases known as the town and country solicitor cases, which would be relevant in Singapore and West Malaysia where, in an unusual case, the solicitor who is retained instructs another local solicitor on behalf of his client and where, in a more usual case, he instructs a Queen's Counsel on behalf of his client. In such cases, C retains a country solicitor and he in turn employs a London solicitor as agent. It is clear where this happens that the London agent is not the solicitor of the client. The London agent has no right to look to C for costs incurred or to apply for a charging order. It was argued in *Wray v. Kemp* that the court ought to recognise the usual practice of substituting the name of the London agent for that of the country solicitor. In dismissing the argument, Chitty J said: "that may be a perfectly reasonable practice as between the solicitors themselves but it does not make the London agents the solicitors of the party who gave the retainer to the country solicitor … A court may well be prepared to recognise a difference when the solicitor who is employed by the solicitor retained practises in another jurisdiction. In the Canadian case of *Re Eggertson v. Garland*, a majority of the Court of Appeal held that where the retained solicitor has not the power to do the work, it is necessarily implied that the client has employed him as agent to employ a solicitor capable of doing the work so that the relation of solicitor and client will be constituted between principal and sub-agent. That case, of course, has no application to a Queen's Counsel because, although technically he practises in a different jurisdiction, yet, when admitted, he is deemed to be an authorised Singapore or West Malaysian solicitor.

[25] In the same way, once CA was admitted as an advocate of the High Court of Borneo in respect of the two admiralty suits concerned in the current case, he is deemed to be an authorised solicitor in that High Court for the purposes of the two admiralty suits. And, cases wherein the courts had recognized a difference where a solicitor in one jurisdiction retains another solicitor in a different jurisdiction are NOT applicable. Furthermore, it is also pertinent to take note of the footnote in the same textbook where reference was made to the Singapore Practice Circular Nos 12(b) and 40 Chap 1 which takes the view that where a solicitor engages a foreign colleague, he is personally responsible unless there is an express agreement with his client to the contrary.

[26] The third party himself has made it clear that he looked to both the defendants and the plaintiffs for payment of the final bill. Also to be noted is that the bill dated 7 June 1990 preceding the final bill dated 23 March 1991 was addressed only to the defendants. Reference should also be made to the contents of the third party's solicitor's letter to SD dated 25 March 1991.

[27] Accordingly, in my considered view, there is nothing to estop or preclude the defendants from maintaining the correct legal position that the third party was their agent and it ought to have been the defendants to whom the third party was entitled to look for payment. The third party has obviously intended to hold the defendants liable for payment of his fees as otherwise he would not have addressed any of the bills to the defendants and would not have dealt with the defendants. The third party may also have wanted to look to the plaintiffs for payment as well, but I hold that since the third party was the defendants' agent and not the substituted agent of the plaintiffs, the consequences in s. 145 of the Contracts Act must follow.

[28] Now let me, for completeness also address the other issues raised by the third party.

[29] The third party had alleged in his counsel's written submission that the defendants have denied personal liability to pay his final bill and therefore the defendants should be estopped from going back on their words. One of the fatal flaws of this argument is that it is clearly contradictory to the stand taken by the third party that the defendants are liable to pay his bill, and indeed in his counterclaim he had also asserted that the defendants are estopped from denying that they are personally liable to pay his fees. The third party should not blow hot and cold – on the one hand allege that the defendants are estopped from going back on their stand that they are not personally liable for his fees and, on the other hand, counterclaim against the defendants, (on the basis of estoppel), that the defendants are personally liable to pay his fees. Taking into account the undisputed fact that the third party's role was at all material times no more than that of 'a postman', one cannot rule out the probability that the defendants denied liability to pay the third party's final bill because it was exorbitant. A further pertinent observation is that both the plaintiffs and the defendants had disputed the entitlement of the third party to render a bill under

the 13th Schedule of the 1988 Rules. This court would have to note that since the third party himself had on various occasions issued his bills directly to the defendants as well as to the plaintiffs through the defendants, and had often asserted that he looked to the defendants for payment of his fees, it is wholly untenable to allege that the defendants should be estopped from contending that in fact and in law, the relationship between the plaintiffs and the defendants is that of principal and agent and that between the defendants and the third party is that of agent and sub-agent respectively. The third party's allegation that an adverse inference is to be drawn against the defendants for not calling the plaintiffs to give evidence in the third party proceedings is clearly without basis or merit, especially in the light of the third party's own stance in electing not to cross examine the defendants' witness CA and in not leading any evidence of his own.

[30] The undisputed facts of this case – which includes the evidence of CA, that is not in any way challenged by the third party – show conclusively the relationship between the relevant parties. It is not in dispute that the plaintiffs had engaged the firm of SD and not the third party to act in the admiralty suits. Thereafter, the defendants had informed the plaintiffs by way of a telex dated 13 May 1985 (See NAB p 697) that they would need to 'instruct our agents in Sabah, East Malaysia.' It is also an undisputed fact, as set out in CA's evidence, that in most of the letters to the plaintiffs, SD had referred to the third party as 'our agent' and/or 'the/our local solicitor'. Accordingly, it is clear to this court that as far as the plaintiffs are concerned, they had appointed SD to be their agents, and SD had appointed the third party as SD's local agent in Sabah for purposes of the admiralty suits. I have not found one iota of evidence to suggest that the plaintiffs had agreed to the third party being appointed as the substituted agent in place of SD for purposes of the admiralty suits.

[31] The third party had also alleged that first he was appointed as solicitor, presumably by the plaintiffs and thereafter he (the third party), appointed CA as counsel to argue the case. This, I find, is totally contradictory to contemporaneous documents admitted into evidence and the undisputed facts, which are that it was indeed SD who was appointed by the plaintiffs as solicitors. And thereafter, SD informed the plaintiffs that since the admiraltly suits have to be commenced in the High Court of Borneo in Sabah, they had to appoint agents in situ. Although there is no

dispute that the third party was the solicitor on record for the plaintiffs in the admiralty suits yet considering *inter alia*, the fact that all the work was done by SD and the third party's role was no more than that of a merely mechanical, clerical or ministerial nature, such as communicating with the court with regard to the obtaining of early hearing dates and like functions, there could not have been any privity of contract between the principal (the plaintiffs) and the third party.

[32] The cases clearly establish that the largely pivotal question to ask is whether the third party acted under the control of the plaintiffs or the defendants. See *New Zealand & Australia Land Co. v. Watson (ibidem)*.

[33] It is my view that for the third party to establish that there was privity of contract between him and the plaintiffs, it would have been incumbent upon him to at least prove at the hearing of the third party proceedings that: (a) he had substituted and replaced SD as the lawyer in sole charge of the admiralty suits; (b) that SD had thereafter 'walked out of the scene' so to say; (c) that he acted under the control of the plaintiffs; and, (d) he had performed the normal work to be performed by a solicitor in relation to the admiralty suits. Not a scintilla of such evidence was adduced by the third party, whereas the evidence revealed that it was SD who controlled the third party and the latter had hardly any contact with the plaintiffs. The above facts are more than sufficient to distinguish this case from the facts obtaining in the case of *Re Eggertson v. Garland et al* ([1926] 2 DLR 466; [1926] DLR Lexis 913) relied on by the third party.

[34] In the normal case where an instructing solicitor engages a counsel to argue a case, it would be the former who would do all the drafting etc and the counsel would merely argue at the hearings. In the present case, it is a fact that all the work including the drafting of pleadings and affidavits was done by the firm of SD and CA and the third party's role was purely ministerial. A further unfortunate feature of this case is that it was open to the third party to adduce evidence to refute the statements of fact given in testimony by CA on behalf of the defendants but he elected not to do so, which completely precludes him from contending that he did any work other than purely ministerial work. Apart from being solicitors on record, I am entirely satisfied from the evidence that the third party did not do

any of the work that a normal lawyer would have done in relation to the admiralty suits. This is a very important factor which this court has to take into consideration in deciding whether the third party had in fact replaced SD as the agents of the plaintiffs or, as the defendants contend, he was merely the sub-agent for ministerial purposes. The fact that the third party appeared as the solicitor for the plaintiffs in the papers filed in the admiralty suits does not *ipso facto* mean that the third party is not merely the sub-agent of the plaintiffs. Section 144 of the Contracts Act states that: "A sub-agent is a person employed by, and acting under the control of, the original agent in the business of the agency." In this case, the evidence points to the fact that the third party was employed by the defendants and acted under the control of the defendants. Section 145(1) of the Contracts Act provides that: "Where a sub-agent is properly appointed, the principal is, so far as regards third persons, represented by the sub-agent, and is bound by and responsible for his acts, as if he were an agent originally appointed by the principal." In the present case, so far as regards third persons, though the plaintiffs as principals are bound by and are responsible for the acts of the sub-agent as if he were an agent originally appointed by the principal, it does not in any way detract from the position in law and in fact that the third party is merely the sub-agent (*vis-à-vis* the plaintiffs) employed by the defendants who are the original agents appointed by the plaintiffs.

[35] A further pertinent point is that since the undisputed facts show that the defendants did all the work and controlled the third party and the latter had also looked to the defendants for payment of his fees and disbursements, the legal position, as expressly set out in s. 145(2) and (3) of the Contracts Act would apply and the defendants are responsible to the plaintiffs for the acts of the third party including the wrongful misappropriation of the Sheriff's Refund which are trust monies belonging to the plaintiffs, and the third party is in turn also responsible for his acts to the defendants.

[36] After careful consideration of the settled law pertaining to agency, sub-agency and substituted agency and the unchallenged testimony of CA in conjunction with all the contemporaneous documents in ABD and NAB, I find that the third party was at all material times only acting as an agent or local solicitor for the defendants (or sub-agent *vis-à-vis* the plaintiffs) in the admiralty

suits. Accordingly, I hold that the third party is liable to indemnify the defendants in the sum of RM900,000 which the latter had paid to the plaintiffs. Fortunately for the third party, this sum was, due on the said compromise, substantially less than what the defendants would have been liable in law to pay to the plaintiffs. I further hold that the third party, being the sub-agent and not the agent of the plaintiffs, had no jurisdiction or right to appropriate the Sheriff's Refund in the sum of RM1,350,595.20 on the excess Sheriff's Commission which are trust monies belonging to the plaintiffs. Clearly, the third party only had the right to look to the defendants for his proper remuneration, and the defendants are accordingly liable to the plaintiffs for their agent's misappropriation of the Sheriff's Refund.

On Issues B, C And D

[37] On whether the defendants are liable to pay the third party on the bill dated 23 March 1991 (final bill) and the corollary question whether the third party is entitled to found his bill under the 13th Schedule of the 1988 Rules, I find that the bill was not properly rendered under the 13th Schedule of the 1988 Rules which, as expressed in clear unequivocal language, only applied to 'Debt Collection (Non-Contentious) work'. Quite apart from the fact that the 1988 Rules were not even in existence at the date the defendants engaged the third party, It is also uncontroverted by the third party that the admiralty suits were contested, and hence, contentious work. The words 'contentious business' are nowhere defined in the Advocates Ordinance of Sabah but are defined in s. 3 of our Legal Profession Act 1976 to mean "business done by an advocate and solicitor, in or for the purpose of proceedings begun before a court of justice, tribunal, board, commission, Council, statutory body or an arbitrator". In my considered view, although our Legal Profession Act is not applicable in Sabah, surely the definition of 'contentious business' set out in this Act could be taken as being indicative if not definitive of the meaning to be ascribed to the same or similar words used in their said 1988 Rules. The term 'contentious business' therefore must surely include any business which involves the commencement of legal proceedings, which would in turn necessitate the issuing of a writ or other originating process. This reasoning is consistent with the opinion expressed by Tan Yock Lin, in his book The Law of Advocates and Solicitors in Singapore and West Malaysia in which he states, at p. 326, that: "... the words 'in or for the purposes of proceedings begun before a court

or arbitrator' must surely mean that the line between contentious and non-contentious business is now drawn at the only possible place for it, namely, the issue of the writ or other originating process." The *dicta* of Wynn-PerryI J in *Re Simpkin Marshall Ltd* [1959] Ch 229 is illuminating. He said: 'All business is now to be regarded as contentious which is done before proceedings are begun, provided that the business is done with a view to the proceedings being begun, and that they are in fact begun, and also all business done in the course of the proceedings. All other business is non-contentious.' It would follow that non-contentious business would be matters like conveyancing, company acquisitions and mergers, preparation of wills, settlements and contracts. This construction also accords with the examples of contentious and non-contentious business listed in Appendix A of the English Law Society's Remuneration Committee booklet for solicitors, under Contentious Costs and Solicitors And Taxation.

[38] On whether the instant case concerns 'contentious business': the defendants in the 2 admiralty suits had filed a defence and counterclaim. There was an interlocutory application filed on behalf of the plaintiffs (which was argued by CA for the plaintiffs) for the appraisal and sale of the 2 vessels pendente lite. That application was contested by the defendants and numerous affidavits were filed. The High Court judge ruled against the plaintiffs and dismissed the application, and a notice of appeal was filed on behalf of the plaintiffs to the Supreme Court. It can be seen from the grounds of judgment (ABD p 325) that the actions were defended. This is what the learned judge said at p. 3 of the judgment: "The present case is a defended action. The defendants have appeared and have put up a posture that they are definitely defending this action, and more, they are also showing concern in the welfare of the ship …"

[39] Faced with those facts, I have to hold that the third party is not entitled to the Final Bill under the 13th Schedule of the 1988 Rules. And that, not only was the third party clearly not entitled to the Final Bill on a fixed scale of fees, as he had done, but that the amount of his Bill is also exorbitant bearing in mind the unchallenged evidence led by CA, that everything was done and drafted by the defendants, and that CA had appeared as counsel in ALL of the hearings and argued on behalf of the plaintiffs.

[40] It is indeed interesting to juxtapose the third party's Final Bill (and he has previously rendered interim bills on the basis of work done which were paid) for the sum of USD529,000, with what the defendants had billed the plaintiffs for services rendered by them. Altogether the defendants had issued 3 invoices, being: (a) invoice dated 24 June 1985 for fees in the amount of RM30,010; (b) invoice dated 2 May 1986 for fees in the amount of RM20,025; and (c) invoice dated 5 December 1991 for fees in the amount of RM162,020. The last invoice which was the final invoice issued by the defendants was not paid by the plaintiffs due to the disputes which had arisen between them with regard to the Third Party's Bill coupled with the set off of the Sheriff's Refund by the third party. Considering the unique and remarkable factual matrix of this case, the defendants couldn't have stated the gist of their case against the third party in more poignant language. They had submitted that: (i) the third party had acted only as the solicitor on record in the admiralty suits in Sabah, (East Malaysia), under its sole control; (ii) CA was admitted ad hoc to practice as an advocate in the admiralty suits and he did all the work and attended and argued all hearings; (iii) the third party had merely acted "as a postman for ministerial, clerical and mechanical acts" in the suits; (iv) yet, the third party had retained the Sheriff's-commission refund of RM1,350, 595.20 towards set off of his Final Bill and has now counter-claimed a further sum of RM145,687.66; and (v) whereas the sum total of all that the defendants had received from the plaintiffs towards fees for services rendered by them was a mere RM50,035 under the invoices dated 24 Jun 1985 and 2 May 1986 which pales into insignificance. Nevertheless, I am sure the defendants need no reminding that this is not a court of morals to resolve their all too real predicament without regard to the law. The only unfortunate feature of this case is that it was not heard and disposed of 9 years earlier.

[41] The judgment of this court is that the defendants are entitled to an indemnity from the third party in respect of the sum of RM900,000 paid by them to the plaintiffs. Prayer (a) of encl. 58A is allowed in terms that the defendants are entitled to an indemnity from the third party in the sum of RM900,000. The third party shall pay the defendants interests at 8% per annum on the RM900,000 with effect from the date that this sum is paid by the defendants to the plaintiffs until full satisfaction by the third

party. The third party shall bear the defendants' costs in the defense of the plaintiffs' claim against them and also the costs of the third party proceedings.

On The Third Party's Counterclaim

[42] For obvious reasons, the third party has not counterclaimed for the whole of his Bill against the defendants but only for the sum of RM145,687.66. Section 3 of the Limitation Act 1953 provides that the limitation period for breaches of contract is 6 years from the accrual of the cause of action. I agree with the defendants' submission that limitation is part of procedural and not substantive law and therefore the provisions of s. 3 of the Limitation Act 1953 is applicable since the proceedings herein are before the High Court of Malaya, notwithstanding the fact that, had the proceedings been before the High Court of Sabah, the Limitation Ordinance applicable in Sabah would have been applicable to the current case.

[43] In this case, the Bill was dated 23 March 1991. The counterclaim of the third party was only filed on 27 August 2001, more than 10 years after the date of the Bill. Clearly, the counterclaim is time barred and ought to be dismissed with costs. It is trite law that limitation does not extinguish a cause of action but, when pleaded, affords a valid defence to the cause of action, if any. Accordingly, I would hold that the counterclaim of the third party is in any event time barred by limitation, even if there had been a cause of action in the first place. This court has to be mindful that with an indemnity of only RM900,000 ordered on the defendants' claim against him he has been more than amply and very generously compensated on his fees, considering the far larger sum on the Sheriff's Refund that he has retained in October 1991. Most importantly, even should I be amiss on the law of limitation, yet the counterclaim must be dismissed as the third party had neither led any oral evidence nor tendered any documents to support his cause on this score.

[44] In the event, the counterclaim of the third party ought to be and is dismissed with costs.